6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA-HQ-OAR-2023-0330; FRL-4908.1-01-OAR]

RIN 2060-AV20

Review of Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to add requirements for sources to reclassify from major source status to area source status under the National Emission Standards for Hazardous Air Pollutants (NESHAP) program. The requirements of this proposal would apply to all sources that choose to reclassify, including any sources which have reclassified since January 25, 2018. The EPA is proposing that sources reclassifying from major source status to area source status under the NESHAP program must satisfy the following criteria: any permit limitations taken to reclassify from a major source of hazardous air pollutants (HAP) under the Clean Air Act to an area source of HAP must be federally enforceable, any such permit limitations must contain safeguards to prevent emission increases after reclassification beyond the applicable major source NESHAP requirements at time of reclassification, and reclassification will only become effective once a permit has been issued containing enforceable conditions reflecting the requirements proposed in this action and electronic notification has been submitted to the EPA. Additionally, we are proposing clarifications to reporting requirements and updating language regarding submittal of confidential business information.

DATES: *Comments*. Comments must be received on or before **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of

consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Public hearing: If anyone contacts us requesting a public hearing on or before **[INSERT DATE 5 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, we will hold a virtual public hearing. See **SUPPLEMENTARY INFORMATION** for information on requesting and registering for a public hearing.

ADDRESSES: You may send comments, identified by Docket ID No. EPA-HQ-OAR-2023-0330, by any of the following methods:

- Federal eRulemaking Portal: *https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- Email: *a-and-r-docket@epa.gov*. Include Docket ID No. EPA-HQ-OAR-2023-0330 in the subject line of the message.
- Fax: (202) 566-9744. Attention Docket ID No. EPA-HQ-OAR-2023-0330.
- Mail: U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA-HQ-OAR-2023-0330, Mail Code 28221T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460.
- Hand/Courier Delivery: EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m. – 4:30 p.m., Monday – Friday (except federal holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/*, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact U.S. EPA, Attn: Nathan Topham, Mail Drop: D243-02, 109 T.W. Alexander Drive, P.O. Box 12055, RTP, North Carolina 27711; telephone number: (919) 541-0483; email address: *topham.nathan@epa.gov*.

SUPPLEMENTARY INFORMATION:

Participation in virtual public hearing. To request a virtual public hearing, contact the public hearing team at (888) 372-8699 or by email at *SPPDpublichearing@epa.gov*. If requested, the hearing will be held via virtual platform on **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The hearing will convene at 10:00 a.m. Eastern Time (ET) and will conclude at 4:00 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details at *https://www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112*.

If a public hearing is requested, the EPA will begin pre-registering speakers for the hearing no later than 1 business day after a request has been received. To register to speak at the virtual hearing, please use the online registration form available at *https://www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112* or contact the public hearing team at (888) 372-8699 or by email at *SPPDpublichearing@epa.gov*. The last day to pre-register to speak at the hearing will be **[INSERT DATE 12 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers at: *https://www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112*.

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have 4 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to topham.nathan@epa.gov. The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112*. While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact the public hearing team at (888) 372-8699 or by email at *SPPDpublichearing@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the *Federal Register* announcing updates.

If you require the services of a translator or special accommodation such as audio description, please pre-register for the hearing with the public hearing team and describe your needs by **[INSERT DATE 7 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The EPA may not be able to arrange accommodations without advanced notice.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA-HQ-OAR-2023-0330. All documents in the docket are listed in *https://www.regulations.gov/*. Although listed, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. With the exception of such material, publicly available docket materials are available electronically in Regulations.gov.

Instructions. Direct your comments to Docket ID No. EPA-HQ-OAR-2023-0330. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov/*, including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically to *https://www.regulations.gov/* any information that you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets*.

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be

free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets*.

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov/*. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, note the docket ID, mark the outside of the digital storage media as CBI, and identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI and note the docket ID. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

Our preferred method to receive CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (*e.g.*, Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office at the email address oaqpscbi@epa.gov, and as described above, should include clear CBI markings and note the docket ID. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email oaqpscbi@epa.gov to request a file transfer link. If sending CBI information through the postal service, please send it to the following address: OAQPS Document Control Officer (C404-02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA-HQ-OAR-2023-

0330. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

Preamble acronyms and abbreviations. Throughout this preamble the use of "we," "us," or "our" is intended to refer to the EPA. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

CAA	Clean Air Act
CEDRI	Compliance and Emissions Data Reporting Interface
CFR	Code of Federal Regulations
D.C. Cir.	the United States Court of Appeals for the District of Columbia Circuit
EPA	Environmental Protection Agency
FIP	Federal Implementation Plan
HAP	hazardous air pollutant(s)
MACT	maximum achievable control technology
MM2A	Major MACT to Area
MRR	monitoring, recordkeeping, and reporting
NESHAP	national emission standards for hazardous air pollutants
NMA	National Mining Association
NSR	New Source Review
NTTAA	National Technology Transfer and Advancement Act
OIAI	Once In, Always In
OMB	Office of Management and Budget
PRA	Paperwork Reduction Act
PSD	prevention of significant deterioration
PTE	potential to emit
RFA	Regulatory Flexibility Act
RIA	Regulatory Impact Analysis
SIP	State Implementation Plan
TIP	Tribal Implementation Plan
tpy	tons per year
UMRA	Unfunded Mandates Reform Act

Organization of this document. The information in this preamble is organized as follows:

I. General Information

A. Does This Rule Apply to Me?

Categories and entities potentially impacted by this rule include major sources of HAP that choose to take limitations to restrict their potential to emit in order to reclassify from a major source of HAP to an area source of HAP pursuant to the requirements in 40 CFR part 63, subpart A, implementing section 112 of the CAA. This rule also would impact those sources that have reclassified since January 25, 2018.

Federal, state, local, and tribal governments may be affected by the proposed amendments, once promulgated, if their current programs do not meet the requirements, and those jurisdictions choose to create potential to emit (PTE) limiting mechanisms that allow sources located within their jurisdiction to reclassify from major to area source status under the NESHAP program. Section 112(l) of the CAA allows for delegation of the implementation and enforcement of NESHAPs to state and local air pollution control agencies and 40 CFR part 63, subpart E contains the regulatory framework for such delegations. Per 40 CFR 63.90(e), programs approved under 40 CFR part 63, subpart E are federally enforceable by the

Administrator and citizens under the CAA[1]. Subpart E describes the types of delegations, including straight delegations of NESHAPs (delegation of individual NESHAPs without change), rule adjustment (delegation of individual NESHAPs with changes), rule substitution (delegation of individual NESHAPs through use of a state/local/tribal rule in place of the NESHAP), equivalence by permit (alternative requirements and authorities that take the form of permit terms and conditions for individual facilities instead of source category regulations), and approval of programs that substitute for CAA section 112 requirements (intended for mature air toxics programs with many regulations affecting source categories regulated by Federal section 112 standards). Subpart E describes the necessary components for programs, timing of review and approval by the EPA, and approval or disapproval process for such programs. If federally enforceable HAP PTE limiting mechanisms do not exist in a state, that state can choose to submit mechanisms according to one of the processes provided in 40 CFR part 63, subpart E. In short, this process involves a state submitting authorities to the EPA for review and approval to use in lieu of CAA section 112 requirements. While the specific steps involved in this process depend on the type of HAP PTE limiting mechanism under consideration (e.g., the process for a straight delegation is simpler than the state program approval process), the end result is a federally enforceable mechanism that has been reviewed and approved by the EPA. We are seeking comment on the potential burdens on states and regulated facilities related to the use of 40 CFR part 63, subpart E by states for mechanisms to allow sources to reclassify from major sources to area sources. We are also seeking comment on the time needed should a state choose to submit programs for EPA review and approval under subpart E in order to allow for sources to reclassify from major sources to area sources where no such federally enforceable programs currently exist. This proposal does not require any changes or seek to alter in any way existing

1 This refers to the legal authority granted under the CAA (i.e., under section 113 and section 304(a) of the statute) to the EPA Administrator and citizens to enforce in Federal court all limitations and conditions that implement requirements under the CAA (e.g., issued under an approved program under section 112(l) of the CAA or a SIP or another statute administered by the EPA.).

state-only enforceable PTE limiting mechanisms that are not used for sources reclassifying from major sources of HAP to area sources of HAP.

The EPA is the permitting authority for issuing, rescinding, and amending permits for sources in Indian country, with four exceptions.[2] Once promulgated, state, local, or tribal regulatory authorities[3] may receive requests to issue new permits or make changes to existing permits for sources in their jurisdiction to address the amended requirements.

B. Where Can I Get a Copy of This Document and Other Related Information?

In addition to being available in the docket, an electronic copy of this action is available on the Internet. Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at *https://www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112*. Following publication in the *Federal Register*, the EPA will post the *Federal Register* version of the proposal and key technical documents at this same website.

A memorandum showing the rule edits that would be necessary to incorporate the changes to 40 CFR part 63, subpart A proposed in this action is available in the docket (Docket ID No. EPA-HQ-OAR-2023-0330). The EPA also will post a copy of this document to *https://www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112*.

II. Background

A. What is the statutory authority for this action?

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[2] Two tribes have approved title V programs or delegation of 40 CFR part 71. The tribes may have sources that request to no longer be covered by title V. Neither of these two tribes have approved minor source permitting programs but may in the future. In the meantime, the tribes will need to coordinate with the EPA, who is the permitting authority in Indian country for these requests. In addition, two other tribes have approved TIPs authorizing the issuance of minor source permits. Only one of these tribes has a major source that would be eligible to request reclassification. If that source requests a new permit, the tribe may issue the minor source permit, but the EPA would need to be made aware of the request, as the EPA is the permitting authority for title V.

[3] The term regulatory authority is intended to be inclusive of the federal, state, tribal, or local air pollution control agency with authority to process reclassification requests and issuance of enforceable PTE limits.

The statutory authority for this action is provided by section 112 of the CAA, as amended (42 U.S.C. 7401 *et seq*.). Section 112 of the CAA requires the EPA to establish emissions standards for "major sources" and "area sources" of HAP to control and reduce their emissions. Section 112(a)(1) defines major source, in relevant part, as "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants"; and 112(a)(2) defines area source, in relevant part, as "any stationary source of hazardous air pollutants that is not a major source." 42 U.S.C. 7412(a)(1) and (2).

For major sources, section 112 establishes a two-stage regulatory process to develop standards to control HAP emissions. The first stage requires the EPA to establish technology-based standards based on the maximum achievable control technology (MACT). In this stage the EPA must establish minimum standards based on best performing units in a source category, referred to as the MACT floor, and evaluate whether additional emission reductions are achievable based on the EPA's consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, referred to as the beyond-the-floor analysis. The second stage requires the EPA to evaluate residual risk from HAP after implementation of the initial standards to determine whether promulgation of additional standards is needed to provide an ample margin of safety to protect public health or to prevent an adverse environmental effect, referred to as the residual risk review; and requires the EPA to evaluate developments in practices, processes, and control technologies to determine if more stringent standards are necessary, referred to as the technology review. Pursuant to CAA section 112(f)(2), the EPA is required to perform residual risk reviews within 8 years of promulgating initial standards; and pursuant to section 112(d)(6), the EPA is required to perform the technology review no less often than every 8 years.

For area sources, the EPA may elect to promulgate alternative standards than those established for major sources that provide for the use of generally available control technologies (GACT) or management practices to reduce HAP emissions. Unlike MACT standards required for major sources, GACT standards are not required to be updated pursuant to residual risk reviews and unlike the MACT "floor" process, GACT standards may consider costs when establishing the level of the standard.

B. History of PTE and Enforceability of Limits in the NESHAP Program

The potential to emit (PTE) is key to the distinction between major and area sources. PTE refers to the maximum capacity of a stationary source to emit a pollutant under its physical and operational design and is used to determine whether a source qualifies as a major or area source. In 1994, the EPA promulgated the definition of PTE in the General Provisions of the NESHAP at 40 CFR 63.2, which defined PTE in terms based on the major source definition in section 112(a)(1) of the CAA.[4] As promulgated in 1994, the PTE definition states that PTE "means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable." Under this definition, and consistent with section 112(a)(1), sources that would otherwise qualify as major sources are able to obtain enforceable permit limitations from the EPA or delegated authority containing physical or operational limits to bring their emission below the major source threshold, referred to as synthetic minor sources.

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[4] CAA section 112(a)(1) defines major source, in relevant part, as "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or *has the potential to emit considering controls*, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." (emphasis added).

In *National Mining Association (NMA) v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995), the D.C. Cir. remanded without vacatur the 40 CFR 63.2 definition to the EPA to justify the requirement that physical or operational limits on the capacity to emit a pollutant be "federally enforceable," *i.e.*, whether limits needed to be enforceable by the EPA and citizen groups under the CAA or other federal statutes. The *NMA* decision confirmed that the EPA has an obligation to ensure that limits considered in determining a source's PTE are effective, but it stated that the Agency had not adequately explained how "federal enforceability" furthered effectiveness. 59 F.3d at 1363-1365.[5]

After the *NMA* decision, the EPA extended a pre-existing transitional policy allowing the use of non-federally enforceable limits (*e.g.*, state-only enforceable limits) for limiting PTE provided those limits are legally enforceable and practicably enforceable.[6] Legal enforceability means that the reviewing authority has the right to enforce a limit or restriction. As the EPA explained in the transitional policy, practicably enforceable means that limitations and restrictions must be of sufficient quality and quantity to ensure accountability, and specifically, for a permit provision to be practicable enforceable it must specify "(1) a technically-accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, annually); and (3) the method to determine compliance including appropriate monitoring, recordkeeping and reporting."[7]

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[5] Two additional cases addressing PTE in different CAA programs were decided after *National Mining*. In *Chemical Manufacturers Ass'n v. EPA*, No. 89–1514, 1995 WL 650098 (D.C. Cir. Sept. 15, 1995), the court, in light of *National Mining*, vacated and remanded to EPA the federal enforceability component in the potential to emit definition in the PSD and NSR regulations (40 CFR parts 51 and 52). In *Clean Air Implementation Project v. EPA*, No. 96–1224, 1996 WL 393118 (D.C. Cir. June 28, 1996), the court vacated and remanded the federal enforceability requirement in the title V regulations (40 CFR part 70). The *CMA* and the *CAIP* orders were similar in that they contained no independent legal analysis, but rather relied on the *National Mining* decision.

[6] *See* "Third Extension of January 25, 1995 Potential to Emit Transition Policy," from John S. Seitz and Eric V. Schaeffer to Regional Offices (December 20, 1999). *See also* "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act," from John S. Seitz and Robert I. Van Heuvelen to Regional Offices (January 25, 1995); "Extension of January 25, 1995, Potential to Emit Transition Policy," from John S. Seitz and Robert I. Van Heuvelen to Regional offices (August 27, 1997). Copies of these memoranda are available in the docket for this action.

[7] "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act," from John S. Seitz and Robert I. Van Heuvelen to Regional Offices (January 25, 1995)

On March 23, 2001, the EPA added recordkeeping requirements for applicability determinations for sources with a maximum capacity to emit HAP in amounts greater than major source thresholds but with PTE limits to avoid applicability of a standard.[8] At that time, the EPA also confirmed that until the rules are clarified to address various PTE issues, consistent with the NMA Court decision, any determination of HAP PTE under 40 CFR 63.2 should consider the regulations and also take into consideration the EPA transition policy guidance memoranda. 66 FR 16342 (March 23, 2001).

On November 19, 2020, the EPA issue a final rule titled "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act," 85 FR 73854 (referred to here as the 2020 MM2A final rule), in which the EPA made an interim ministerial revision to the definition of "potential to emit" in 40 CFR 63.2, which is discussed further in section II.C.1. of this preamble. See 85 FR 73875 (November 19, 2020). Specifically, the Agency removed the word "federally" from the phrase "federally enforceable" that was in the 40 CFR 63.2 definition of "potential to emit."

C. History of Reclassifications in the NESHAP Program

1. What has Happened to Date in Section 112 of the CAA Related to Major Source Reclassifications?

Shortly after the EPA began promulgating individual NESHAP standards following the 1990 CAA Amendments, the Agency received multiple requests to clarify when a major source of HAP could avoid CAA section 112 requirements applicable to major sources by taking enforceable limits on its PTE below the major source thresholds. In response, the EPA issued a 1995 a memorandum[9] that provided guidance on three timing issues related to avoidance of CAA section 112 requirements for major sources:

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[8] See 40 CFR 63.10(b)(3). These requirements became final April 5, 2002. *See* 67 FR 16582 (April 5, 2002); *see also*, 66 FR 16342 (March 23, 2001).

[9] "Potential to Emit for MACT Standards - Guidance on Timing Issues," from John Seitz to the EPA Regional Air Division Directors (May 16, 1995) ("1995 Seitz Memorandum") (available in the docket for this action).

- "By what date must a facility limit its PTE if it wishes to avoid major source requirements of a MACT standard?"
- "Is a facility that is required to comply with a MACT standard permanently subject to that standard?"
- "In the case of facilities with two or more sources in different source categories: If such a facility is a major source for purposes of one MACT standard, is the facility necessarily a major source for purposes of subsequently promulgated MACT standards?"

In the 1995 Seitz Memorandum, the EPA stated our interpretation of the relevant statutory language that facilities that are major sources of HAP may switch to area source status at any time until the "first compliance date" of the standard.[10] Under this interpretation, facilities that are major sources on the first substantive compliance date of an applicable major source NESHAP were required to comply permanently with that major source standard even if the source was subsequently to become an area source by limiting its PTE. This position was commonly referred to as the "Once In, Always In" (OIAI) policy. The 1995 Seitz Memorandum provided that a source that is major for one MACT standard would not be considered major for a subsequent MACT standard if the source's potential to emit HAP emissions was reduced to below major source levels by complying with the first major source MACT standard. In the 1995 Seitz Memorandum, the EPA set forth transitional policy guidance that was intended to remain in effect only until the Agency proposed and promulgated amendments to the 40 CFR part 63 General Provisions.

The expressed basis for the OIAI policy was that it would help ensure that required reductions in HAP emissions were maintained over time in a way that was consistent with the

[10] The "first substantive compliance date" is defined as the first date a source must comply with an emission limitation or other substantive regulatory requirement (*i.e.*, leak detection and repair programs, work practice measures, etc., but not a notice requirement) in the applicable standard.

language and structure of the statute, and would avoid compromising the emissions reductions that Congress mandated major source to achieve.[11] The EPA explained at the time that because the CAA did not directly address a deadline for a source to avoid requirements applicable to major sources through a reduction of potential to emit, the EPA viewed the OIAI policy as consistent with "the language and structure of the Act . . . that sources should not be allowed to avoid compliance with a standard after the compliance date, even through a reduction in potential to emit."[12]

Since issuing the OIAI policy, the EPA has twice proposed regulatory amendments that would have altered the OIAI policy. In 2003, the EPA proposed amendments that focused on HAP emissions reductions resulting from pollution prevention activities but did not finalize the proposed changes relevant to the OIAI policy. *See* 68 FR 26249 (May 15, 2003); 69 FR 21737 (April 22, 2004).

In 2007, the EPA proposed to replace the OIAI policy set forth in the 1995 Seitz Memorandum. 72 FR 69 (January 3, 2007). In that proposal, the EPA proposed that a major source that is subject to a major source MACT standard would no longer be subject to that standard if the source were to become an area source through an enforceable limitation on its PTE for HAP. Under the 2007 proposal, major sources could take such limits on their PTE and obtain "area source" status at any time and would not be required to have done so before the "first compliance date," as the OIAI policy provided. *Id.* at 70 ("The regulatory amendments proposed today, if finalized, would replace the 1995 OIAI policy and allow a major source of HAP emissions to become an area source at any time by limiting its PTE for HAP below the major source thresholds.").

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[11] See 1995 Seitz Memorandum at 9 ("A once in, always in policy ensures that MACT emissions reductions are permanent, and that the health and environmental protection provided by MACT standards is not undermined.").
[12] *Id.* at 6.

Many commenters supporting the 2007 proposal expressed the view that, by imposing an artificial time limit on major sources obtaining area source status, the OIAI policy created a disincentive for sources to implement voluntary pollution abatement and prevention efforts, or to pursue technological innovations that would reduce HAP emissions further. Stakeholders commented to the EPA that the definitions in CAA section 112(a) contain a single factor for distinguishing between major source and area source—the amount of HAP the source "emits" or "has the potential to emit." Commenters further stated that the temporal limitation imposed by the OIAI policy was inconsistent with the CAA and created an arbitrary date by which sources must determine whether their HAP PTE will exceed either of the major source thresholds. Other commenters opposed the 2007 proposal, arguing that it would contravene Congress's intent in developing section 112 of the CAA, lead to backsliding in performance of pollution controls and resulting health protections from sources no longer subject to MACT standards, and lacked sufficient rationale to justify overturning long-standing EPA policy regarding major and area sources. The EPA never took final action on the 2007 proposal, and it was later superseded and replaced. Comments on the lack of a temporal distinction in defining major sources and area sources were re-emphasized in comments received per Executive Order 13777, Enforcing the Regulatory Reform Agenda (February 24, 2017), and the Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (January 24, 2017).

On January 25, 2018, the EPA issued a memorandum from William L. Wehrum, Assistant Administrator of the Office of Air and Radiation, to the EPA Regional Air Division Directors titled "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act" (MM2A Memorandum) withdrawing the OIAI policy.[13] The MM2A Memorandum discussed the statutory provisions that govern when a major source subject to

[13] See notice of issuance of this guidance memorandum at 83 FR 5543 (February 8, 2018).

major source NESHAP requirements under section 112 of the CAA may be reclassified as an area source, and thereby avoid being subject thereafter to major source NESHAP requirements and other requirements applicable to major sources under CAA section 112. In the MM2A Memorandum, the EPA discussed the language of CAA section 112(a) regarding Congress's definitions of "major source" and "area source," and determined that the OIAI policy articulated in the 1995 Seitz Memorandum was contrary to the plain language of the CAA and, therefore, must be withdrawn.

In the MM2A Memorandum, the EPA announced the future publication of a proposed rule to receive input from the public on adding regulatory text consistent with the reading of the statute as described in the MM2A Memorandum. On July 26, 2019, the EPA proposed regulatory text to implement the reading of the statute as discussed in the MM2A Memorandum.[14] The 2019 proposal superseded and replaced the 2007 proposal.[15]

The 2019 MM2A proposal also addressed questions received after the issuance of the 2018 MM2A Memorandum. In the comments on the 2007 and 2019 proposals, many stakeholders asserted that the implementation of this reading and withdrawal of the OIAI policy would create incentives for stationary sources that have reduced HAP emissions to below major source thresholds to reclassify to area source status by taking enforceable PTE limits and reduce their compliance burden. These stakeholders also stated that sources with emissions above major source thresholds after complying with CAA section 112 major source requirements could be encouraged to evaluate their operations and consider additional changes that can further reduce their HAP emissions to below the major source thresholds. Other stakeholders raised the concern that allowing sources to reclassify could potentially result in emission increases from sources that have reduced their actual emissions to below the major source thresholds because they have had to comply with major source NESHAP requirements. Some stakeholders contended that

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[14] *See* 84 FR 36304 (July 26, 2019).
[15] *See* 72 FR 69 (January 3, 2007).

federal safeguards (*i.e.,* conditions on reclassification requiring that sources limit emissions to at least the level of control achieved under the major source NESHAP) were required to ensure that the emissions did not increase from sources that reclassified. They noted that some states cannot implement air pollution control requirements that are not derived from Federal regulations, while other stakeholders asserted that only those major sources that had reduced emissions through pollution prevention or removal of equipment should be allowed to reclassify.

Other stakeholders, generally opposed to requiring safeguards, questioned the legal basis for establishing safeguards that would restrict emissions from area sources. These stakeholders stated that the EPA holds no regulatory authority to prohibit or regulate emissions increases from area sources unless EPA lists these area sources under CAA section 112 and then develops standards, or if area sources exceed the major source threshold. They stated that CAA section 112 contains no restrictions on the gross quantity of emissions emitted from any major or area sources, nor does it outright prohibit stationary sources from undertaking activities that increase emissions.

In the 2019 proposal, the EPA proposed specific criteria that PTE limits must meet for these limits to be effective. The EPA also proposed to amend the definition of "potential to emit" in 40 CFR 63.2 by removing the requirement for federally enforceable limits and requiring instead that limits meet the effectiveness criteria of being both legally enforceable and practicably enforceable. The EPA also proposed to amend 40 CFR 63.2 to include the definitions of "legally enforceable" and "practicably enforceable" described in the MM2A proposal. The EPA then took comment on the effectiveness criteria and the proposed amendments to 40 CFR 63.2.

The EPA received significant comments from many stakeholders on the proposed effectiveness criteria and proposed amendments to 40 CFR 63.2. One of the main concerns raised by stakeholders in their comments was the interactions and effects of the proposed amendments with other CAA programs, including Prevention of Significant Deterioration (PSD),

New Source Review (NSR), State Implementation Plan (SIP), and title V operating permits, and the impacts of the proposed amendments to existing state, local, and tribal agency rules.

The EPA published the 2020 MM2A final rule (85 FR 73854) on November 19, 2020, which formalized the withdraw of the OIAI policy first introduced in the 2018 MM2A Memorandum. The EPA did not take final action on the proposed amendments to 40 CFR 63.2 as it was still considering the comments received on the proposed effectiveness criteria and proposed amendments to 40 CFR 63.2. In the final MM2A rule, the EPA expressed its intention to take action on this aspect of the MM2A proposal in a separate action at a later date. However, as part of the final MM2A rule, the EPA made an interim ministerial revision to the definition of "potential to emit" in 40 CFR 63.2. Specifically, the Agency removed the word "federally" from the phrase "federally enforceable" that was in the 40 CFR 63.2 definition of "potential to emit."

The EPA explained that this interim ministerial revision was not the EPA's final decision and should not be read to suggest that the EPA was leaning towards or away from any particular final action on this aspect of the MM2A proposal. The revision was an interim revision to cover the period of time while the EPA continued to consider the comments on this aspect of the MM2A proposal and until the Agency takes final action with respect to the proposed effectiveness criteria and proposed amendments to 40 CFR 63.2. The EPA asserted that this revision was ministerial because it merely reflected the *NMA* decision, which held that the EPA had not explained why a PTE limit had to be "federally enforceable" to be considered as the basis for reclassifying a major source to area source status. *See NMA v. EPA*, 59 F.3d at 1363-1365.[16] So, for the reasons explained in the final MM2A rule preamble, the revision to the PTE definition did not represent a final decision by the EPA.

Further, the interim ministerial revision did not alter any rights or legal consequences and simply preserved the status quo that has been in effect since the late 1990s. The EPA expressly

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[16] *See* note 6, *supra*.

said that the interim ministerial revision did not change how the EPA applies the transitional policy that the Agency has been following since 1995. This transitional policy allows for any physical or operational limitation on the capacity of the stationary source to emit a pollutant (such as air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed) to be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable or legally enforceable by a state or local permitting authority and practicably enforceable. The final MM2A rule became effective on January 19, 2021.

A significant concern raised during the 2020 MM2A rulemaking is that under the current MM2A framework, sources with adjustable controls can obtain PTE limits just below the major source thresholds to reclassify from major source status to area source status and reduce their control efficiency to reduce operational costs, and subsequently increase emissions, in a manner that would not have been allowed under the major source NESHAP. This possibility stems from the differences in stringency in major source rules compared to area source rules for the same source category. In short, major source NESHAPs require MACT standards that reduce emissions from all major sources in a category to the levels achieved by the best performers. In contrast, NESHAP standards for area sources allow for the use of GACT standards that often require less control of HAP than the corresponding MACT standards for major sources. In addition, GACT standards typically apply to a select group of HAP, known as urban HAP, rather than all listed HAP. Finally, unlike the residual risk requirements for sources subject to MACT standards, there is no requirement for the EPA to evaluate the public health risk that remains after implementation of GACT standards. These differences are most concerning for major source categories for which the area source NESHAP applies to fewer emission points and regulates fewer HAP than the major source rule or for which there is no NESHAP applicable to area sources at all. The current MM2A framework does not provide clear requirements for sources reclassifying in a source category with less stringent or no requirements for area sources,

creating inconsistencies between sources in a given category based on their decision to reclassify or not, between sources across source categories based on the existence and stringency of area source NESHAPs, and between sources based on the robustness of the state or local regulations in the area where they are located.

2. What is Executive Order 13990 and How Does it Impact This Proposal?

On January 20, 2021, President Biden issued Executive Order 13990 Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. This EO called for the EPA to review actions taken during the prior four years and, as appropriate, consider suspending, revising, or rescinding actions that did not align with the Administration's policy to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

III. Proposed Criteria for MM2A Reclassifications

In this action the EPA is proposing to update electronic reporting requirements for sources that reclassify from major to area sources, and to add requirements for sources to reclassify from major source to area source status to improve the effectiveness of PTE limits for these sources. Specifically, the EPA proposes to require safeguards to ensure that reclassified sources cannot increase their emissions as a result of reclassification, and to require PTE limits for reclassified sources be federally enforceable (*i.e.*, enforceable by the EPA and citizens under the CAA or other federal statute). The EPA is proposing these additional criteria for reclassified sources, because of the EPA's particular concern with this subset of sources which may be able to increase emissions as a result of reclassification.

A. Electronic Notification and Reclassification Effective Date

To provide information to the EPA and the public, 40 CFR 63.9(b) requires sources to notify the EPA when a source becomes subject to a relevant standard and 40 CFR 63.9(j) requires sources to notify the Administrator when there is a change in the information previously submitted to the EPA. The notification requirements of 40 CFR 63.9(j) apply to those sources that reclassify from major source to area source status under CAA section 112 (*e.g.*, by taking production or operation limits to reduce a source's HAP emissions below the applicability threshold). Sources that reclassify are currently required to notify the EPA within 15 days after reclassification. The required notification must include information on the standard the source was reclassifying from and to (if applicable), along with the effective date of the reclassification. To ensure the availability of this information, the EPA requires electronic submission of such notifications. Sources that reclassify to area source status by taking limits to reduce HAP emissions are also currently required under 40 CFR 63.10 to keep records of applicability determinations on-site. We are clarifying that reclassifications that occur after the effective date of this action will be effective upon the date of electronic submittal of the notification to the EPA. This clarification will ensure that sources submit the required notification to the EPA when reclassification occurs. We have become aware of some sources that have reclassified and the required reclassification has not been submitted through CEDRI. In order to prevent this from continuing, we have determined that reclassifications will not be considered effective until notification has been submitted to the EPA. Sources that have already reclassified or reclassify prior to the effective date of this action and have not submitted the required electronic notification must submit electronic notification of reclassification to the EPA within six months of the effective date of this action. Reclassified sources that have already submitted electronic notification to the EPA do not need to resubmit the notification. The EPA expects these notification and recordkeeping requirements under 40 CFR part 63 will assist the EPA in its oversight role under the CAA and be of minimal burden to the regulated community.

Additionally, we are proposing to clarify the original intent of the language in 40 CFR 63.9(j) allowing the use of the application for reclassification to fulfill the requirements of notification to more clearly indicate that it must be submitted to the Compliance and Emissions Data Reporting Interface (CEDRI) and contain the information required in 40 CFR 63.9(j)(1) through (4). We are also proposing to update the procedures for submittal of confidential business information to include electronic submittal procedures.

B. Sufficiency of Limits Taken to Reclassify

In this proposal, the EPA is revisiting the sufficiency of restrictions on PTE relied upon for reclassification, *i.e.*, what a source must do to be able to reclassify. The EPA proposes to require (1) additional criteria that a PTE limit must meet before it can serve as the basis for reclassification from major to area for CAA section 112 purposes and (2) federal enforceability of permit limits that are taken by sources to reclassify from major to area source status. The proposed additional criteria for PTE (referred to here as "safeguards") would require a determination that a source reclassifying from major to area source status will not emit beyond what would have been allowed had the source maintained major source status. Federal enforceability would ensure that the EPA and citizens are able to enforce those permit limits taken to reclassify in federal court under the Clean Air Act or other statutes administered by the EPA. In proposing these changes, the EPA seeks to ensure that the opportunity for sources to reclassify from major to area for purposes of CAA section 112 does not undermine the emissions reductions intended by that program.

Hazardous air pollutants pose public health risks at levels well below the major source thresholds (10/25 TPY), at times in very small quantities. Congress understood this fact in enacting CAA section 112 by directing the EPA to further reduce or eliminate HAP emissions

where possible.[17] Further, the EPA shares the concerns raised by commenters on the MM2A rulemaking that sources with adjustable controls that can reclassify by reducing emissions just below the major source threshold could subsequently increase emissions under less stringent, or nonexistent, area source regulations for a given source category. For example, if a major source standard had the effect of reducing emissions of a certain pollutant to 1 ton per year but there is no corresponding area source standard for the same source category, then a source could take a PTE limit of 9.9 tons per year of a single HAP or 24.9 tons per year of combined HAP emissions, thus increasing its emissions, and reclassify under the 2020 MM2A final rule. Indeed, every source in this hypothetical source category could do the same. In order to protect the public from the health risks of HAPs, and based on Congress' intent to reduce harmful HAP emissions and regulate to the maximum extent achievable, the EPA proposes enhanced oversight, compliance assurance, and that national consistency be required for the reclassified sources via safeguards and federal enforceability of restrictions or limitations taken to otherwise avoid applicable requirements as a major source of HAPs under Part 63 to ensure such concerning scenarios do not occur.

In prior rulemakings and guidance, the EPA has discussed the timing of when a source can reclassify from major to area source. Most recently in the 2020 MM2A rule, the EPA adopted the position that the lack of a temporal limitation on whether a source qualifies as a major source under CAA section 112(a)(1) refuted the EPA's earlier OIAI policy. The EPA does not propose to reopen that conclusion here. However, as the EPA discussed in the 2019 proposal to the MM2A rule, in addition to the timing of reclassification there is a separate question as to the sufficiency of the PTE limit taken to reclassify.

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[17] CAA section 112(a)(1) in defining "major source" provides that the EPA may establish a "lesser quantity" threshold for major sources "on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors." In addition, CAA section 112(d)(2) directs the EPA in promulgating emission standards to "require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable)[.]"

The sufficiency of limitations on PTE taken to reclassify from major to area source status is governed by the definitions of "major source" and "area source" in CAA section 112(a)(1) and (2). Major sources are defined, in relevant part, as sources that can emit or have the potential to emit "considering controls," 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. Area sources are in turn defined as any stationary source of hazardous air pollutants that is not a major source. Therefore, in determining what qualifies as an area source the EPA must consider the major source definition and how to "consider controls" the facility would rely upon to justify its status as an area source. The EPA proposes the most appropriate interpretation of "considering controls" is one that, on the one hand, does not undermine the purposes of CAA section 112 by allowing sources to potentially increase HAP emissions while on the other hand also recognizes that the statute does not place an absolute time limit on the opportunity to reclassify. The former concern was first articulated in the 1995 OIAI policy, the latter in the 2018 MM2A policy and subsequent rulemaking.

Today's proposal seeks to reconcile these objectives by recognizing that a facility subject to a MACT standard may reclassify at any time, while requiring a determination by the state or local permitting authority that doing so will not undermine the emissions reductions entailed by the MACT standard, and further ensuring limits taken to reclassify are effective by allowing for federal and citizen enforcement. The EPA proposes the best interpretation of the term "considering controls" in the definition of "major source" in CAA section 112 allows for this reconciliation. Specifically, the EPA is proposing that for a facility seeking to reclassify from major to area source status for purposes of a particular MACT standard, the "controls" that are determinative are those that are proven to be at least as effective at reducing emissions as the MACT standard to which the facility has been subject, and which are subject to federal enforcement as defined in 40 CFR 63.2.

This interpretation of CAA section 112(a)(1) is consistent with the D.C. Circuit decision *NMA v. EPA*, which recognized the word "controls" commonly refers to governmental restrictions but is ambiguous as used in the major source definition. 59 F.3d 1351, 1362 (D.C. Cir. 1995) ("It is common ground that Congress meant the word 'controls' to refer to governmental regulations and not, for instance, operational restrictions that an owner might voluntarily adopt. (We note, however, that the word could be read that broadly, which certainly supports the government's position that the term is not clear on its face.)"). Accordingly, in assessing a reclassified source, the EPA would determine whether safeguards and the enforceability of limits taken to reclassify, or governmental restrictions, are sufficient for the source to no longer qualify as a major source.

In considering the term "controls," the *NMA* court settled on the touchstone of "effectiveness," faulting the EPA for not adequately explaining the relationship of federal enforceability to that core criterion. The Court explained that the EPA was "not obliged to take into account controls that are only chimeras and do not really restrain an operator from emitting pollution[,]" 59 F.3d at 1362, but that the EPA's determination of what constitutes appropriate "controls" should be tied to how well a limit actually restrains a facility's operations in accordance with CAA section 112. Today's proposal is based on this concept of "effectiveness," and specifically on the reasoning that a limit taken to avoid a MACT standard to which a facility is already subject to cannot be considered an "effective" control if it results in the facility emitting more than it would have under the MACT standard. The EPA is also proposing that the enhanced effectiveness brought about by federal enforceability justifies the requirement that limits taken to avoid a MACT standard be federally enforceable. That is, the EPA is bolstering the effectiveness of PTE limits for reclassified sources by requiring sources to maintain historical emission reductions, and increasing the scope of enforcement to ensure PTE limits are met. The proposal thus employs the concept of "effectiveness" to avoid eroding the purposes of the Act,

while recognizing the flexibility the EPA continues to believe exists for facilities to reclassify from major to area status for purposes of a MACT standard.

Today's proposal is also consistent with the purpose of the CAA in general and CAA section 112, in particular. The CAA is intended "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." CAA section 101(b)(1). CAA section 112 was revised with the 1990 Clean Air Act Amendments after Congress was frustrated with the EPA's slow pace of regulation for sources of hazardous air pollutants, which Congress recognized as a serious public health concern.[18] In enacting CAA section 112, Congress set a broad statutory purpose to reduce the volume of HAP emissions with the goal of reducing the risk from HAP emissions to a level that is protective of even the most exposed and most sensitive subpopulations.[19] Congress therefore established a program for major and area sources that would lead to continued reductions of HAP by requiring the EPA to set technology-based MACT standards pursuant to CAA section 112(d)(2) and (3), to perform risk reviews under CAA section 112(f)(2) and to update MACT standards where they fail to provide an ample margin of safety, and to perform technology reviews pursuant to CAA section 112(d)(6) to review and update, as necessary, MACT and GACT standards based on new developments in pollution control technology. Relatedly, CAA section 112(c)(6) required the EPA to identify and ensure emissions standards were in place for

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[18] *See* H.R. Rep. No. 101–490, at 315 (1990) ("In theory, [hazardous air pollutants] were to be stringently controlled under the existing Clean Air Act section 112. However, . . . only 7 of the hundreds of potentially hazardous air pollutants have been regulated by EPA since section 112 was enacted in 1970."); *id.* at 151 (noting that in 20 years, the EPA's establishment of standards for only seven HAP covered "a small fraction of the many substances associated . . . with cancer, birth defects, neurological damage, or other serious health impacts.")

[19] For example, CAA section 112(f)(2) requires the EPA to promulgate standards under the risk review if necessary to "reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million." CAA section 112(f)(2). Similarly, the listing and delisting provisions in CAA section 112 focus on *any* adverse effects to human health, evidencing Congress' concerns with protecting even the most exposed individuals. *See e.g.*, CAA section 112(b) and (c). For further discussion of how the statutory design of CAA section 112 is meant to quickly secure large reductions in HAP emissions from stationary sources and Congress' direction to the EPA emphasize that the EPA should regulate with the most exposed and most sensitive members of the population in mind in order to achieve acceptable levels of HAP emissions see 88 FR 13956, 13963-13966 (March 6, 2023).

source categories that emit specific, particularly harmful HAP, and which were not initially covered following promulgation of the 1990 Clean Air Act Amendments. The structure of CAA section 112 thus includes specific points at which progress towards public health goals are to be assessed. These assessments depend in no small part on the extent to which major sources of HAP are regulated by MACT standards. While Congress did not speak directly to reclassification from major to area sources, the EPA proposes to find it would be contrary to the emission reduction and health protection objectives of the CAA and CAA section 112 to allow sources to increase their emissions after reclassification. Doing so would serve to diminish as opposed to enhance air quality and could potentially lead to increased HAP emissions and thus increased public health risk from exposure. Moreover, CAA section 112(d)(2) directs the EPA in promulgating emission standards to "require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable)[.]" If a facility subject to the controls of a major source NESHAP can remove those controls by reducing its PTE to below the 10/25 TPY threshold, this substantially reduces the likelihood that Congress' objective of prohibiting emissions can be achieved.

This proposed framework would not apply to a source that has taken restrictions to limit PTE (*i.e.*, a synthetic minor source) before the source's first compliance date of the applicable major MACT standard. The proposed sufficiency criteria for sources that reclassify from major sources to area sources (*i.e.*, safeguards and federal enforceability) would be applicable to reclassified synthetic minor sources, that is sources that are or were subject to a major source NESHAP, have PTE over the major source threshold, and are taking a restriction so as to limit the PTE below the major source threshold. This proposed framework would not apply, however, to reclassified "true" minor sources—that is sources that modify operations such that they are no longer capable of emitting above the major source threshold; nor would it apply to sources that were never subject to a major source NESHAP. The EPA is specifically requesting comment on

whether it is appropriate to differentiate between reclassified synthetic minor and true minor sources, particularly given the proposed justification in this proposal.

This proposal for the EPA to introduce safeguards and federal enforceability for sources that reclassify from area to major source status also differs from the EPA's former OIAI policy because it would continue to allow sources to reclassify consistent with the 2020 MM2A final rule; however, this proposal would introduce conditions that apply to reclassified sources through their permitting authority. The intent is to create flexibility to meet emission reduction goals that did not exist under the OIAI policy while preventing the potential emissions increases allowed under the current MM2A framework.

Further, the EPA seeks comment on its proposed interpretation of "considering controls" to ensure limits taken by sources to reclassify are sufficiently protective.

1. Safeguards

The EPA is proposing that for those sources that reclassify from major source to area source status under the NESHAP program, any limits relied upon as limiting PTE for operations subject to the NESHAP must ensure emissions do not increase beyond what would have been allowed if the reclassifying source had continued to be subject to the major source NESHAP. The proposed safeguards will apply to sources that reclassify after the effective date of this action, as well as those that have reclassified since the 2018 Wehrum memorandum.

Specifically, we are proposing to codify in a new paragraph, 40 CFR 63.1(c)(6)(iv), that any federally enforceable HAP PTE limitations taken by a major source to reclassify to area source status must include one of the following control methods or a combination: (1) continue to employ the emission control methods (*e.g.*, control device and/or emission reduction practices) required under the major source NESHAP requirements, including previously approved alternatives under the applicable NESHAP and associated monitoring, recordkeeping, and reporting (MRR); (2) control methods prescribed for reclassification under a specific NESHAP subpart; or (3) emission controls that the permitting authority has reviewed and

approved as ensuring the emissions of HAP from units or activities previously covered will not increase above the emission standard or level that was acceptable under the major source NESHAP requirements at the time of reclassification. The record of the permitting authority decision should identify the units and methods and include the data and analysis as well as the determination that MRR is adequate to assure compliance.

The EPA proposes the introduction of safeguards, coupled with federal enforceability, will help to ensure the NESHAP program continues to reduce emissions over time, and that sources subject to the NESHAP program are not able to increase their emissions beyond what the major source NESHAP would have allowed as a result of reclassification and/or evade permit limits that would otherwise prevent them from doing so. The EPA proposes safeguards are needed due to differences in EPA and state requirements for certain types of major and area NESHAP sources, which creates instances where it is feasible that two identical sources within a source category could have significantly different emissions requirements for a given pollutant if one remains a major source and the other reclassifies as an area source. This is particularly true in instances where there are no area source requirements for certain industries.

Under this proposed definition, state and local permitting authorities would be charged with ensuring permitting limits taken for sources to reclassify from major to area source satisfy one of the three criteria listed above. That is, the permitting authority will determine that emissions for a reclassified source will not be above what they would have been had the source remained subject to the major source NESHAP. The EPA continues to consider and seeks comment on the specifics of how state and local permitting authorities should implement this definition and make such determinations. We are soliciting comments on whether the determination that a source will not emit above what would have been allowed under the major source NESHAP must be based on the same units of measure as the NESHAP had been (*e.g.*, tons per year vs. pounds per hour). This will largely be a case-by-case decision that will rest partly on the type of measurements used, the method of control, and quantity of emissions in

question. We are also soliciting comment on whether sources should be required to continue to comply with a specific emissions limit using a specific type of control, especially for sources subject to major source NESHAPs that allow for different control options. We are seeking comment on how to best structure safeguards to ensure that flexibility is provided to permitting authorities making these determinations to allow for improvements in control technology effectiveness or efficiency without compromising the emissions reductions achieved by the NESHAP.

The EPA is seeking comment on additional benefits or drawbacks of safeguards for NESHAP reclassifications. The EPA is also seeking comment on other criteria that will improve the process by which sources apply for, and the permitting authority approves, enforceable permit conditions containing safeguard provisions.

In light of the special attention Congress paid to specific pollutants[20] in section 112(c)(6) of the CAA, we are specifically seeking comment on whether additional restrictions are warranted for source categories that are subject to MACT standards for the persistent and bioaccumulative HAP listed pursuant to CAA section 112(c)(6). We believe the proposed safeguards are sufficient to prevent emissions increases but we are seeking comment on whether any of the following additional restrictions are warranted to achieve Congress's directive that source categories emitting these HAP are subjected to MACT standards under CAA section 112(d)(2) or (d)(4). The first possible restriction we are seeking comment on is one that would prevent any sources[21] subject to a major source NESHAP used to reach the EPA's 90 percent threshold for any of the CAA section 112(c)(6) HAP from reclassifying from major source status to area source status. Another restriction we are considering and seeking comment on is one that

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[20] CAA section 112(c)(6) states, in part: "With respect to alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the Administrator shall, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4)."

[21] See EPA-HQ-OAR-2004-0505-0010 for a list of source categories and corresponding NESHAP subparts used to reach the 90% threshold. See table 1.1 of EPA-HQ-OAR-2004-0505-0006 for the 112(c)(6) emission inventory.

would require sources subject to a major source NESHAP to remain subject to the major source NESHAP for emissions of the section 112(c)(6) HAP while allowing those sources source to reclassify and no longer remain subject to the major source NESHAP for emissions of non-112(c)(6) HAP. Finally, we are considering a restriction that would allow such sources to reclassify but would only allow them to use the proposed option in 40 CFR 63.(1)(c)(6)(iv) that requires a source to "continue to employ the emission control methods (e.g., control device and/or emission reduction practices) required under the major source NESHAP requirements, including previously approved alternatives under the applicable NESHAP and associated monitoring, recordkeeping, and reporting (MRR)". We are seeking comment on all of these additional criteria and any other restrictions on sources or source categories emitting 112(c)(6) HAP that may be warranted.

2. Federal Enforceability

In addition to safeguards, the EPA also proposes that limits taken by sources to reclassify from major to area sources must be federally enforceable as a condition of reclassification.[22] Specifically, we are proposing to codify in a new paragraph, 40 CFR 63.1(c)(6)(iii), that, as a condition of reclassification, any PTE limitations taken by a major source to reclassify to area source status must be federally enforceable. The general definition of PTE under 40 CFR 63.2 would not be affected by this proposal to codify a new provision specific to reclassified sources, and as discussed in the following subsection, the EPA proposes to maintain interim revisions introduced to the general definition in the 2020 MM2A final rule. That is, under this proposal, sources that reclassify from major to area source status, would need to take federally enforceable limitations on PTE as a condition of reclassification. However, all other NESHAP sources would continue to be governed by the general PTE definition under 40 CFR 63.2, which does not require federal enforceability.

[22] 40 CFR 63.2 defines "federally enforceable" in relevant part as "all limitations and conditions that are enforceable by the Administrator and citizens under the Act or that are enforceable under other statutes administered by the Administrator."

As discussed above, in *NMA v. EPA*, the D.C. Circuit faulted the EPA for not adequately explaining the relationship of federal enforceability to the core criteria of "effectiveness." In that case, the EPA argued that federal enforceability allowed the EPA to verify that a source's claimed controls were working as they were supposed to, and that federal enforceability provided the EPA with the means to ensure that any operational restrictions intended to limit emissions were actually implemented. In response to these arguments, the *NMA* Court found "EPA's core justification for its federal enforceability policy [was] the need to avoid the administrative burden that EPA would have to bear were it obliged to evaluate the effectiveness of state and local controls and the desirability of uniformity in environmental protection. . . If there [was] a closer fit between the notion of 'federal enforceability' and § 112's concerns with crediting effective controls," it was "not evident" from the record before the Court. 59 F.3d at 1364. Today's proposal is based on the EPA's assessment that federal enforceability of limits for reclassified sources significantly enhances the effectiveness of controls because limits taken by sources to reclassify that are enforceable by the federal government and citizens, in addition to state and local permitting authorities, are more likely to ensure compliance. Simply put, ensuring that more entities can bring an enforcement action if a source violates a PTE limit, *i.e.*, EPA, States, Tribes, local government agencies, and citizen groups, will make the limit more effective in controlling HAP emissions.

In the absence of federal enforceability for reclassified sources, the public is reliant on state and local permitting authorities, and citizen groups in certain jurisdictions, to ensure sources comply with PTE limits. While the EPA maintains that state and local enforcement can be an effective means for ensuring compliance with PTE limits for other NESHAP sources and CAA programs (*e.g.*, NSR and title V), given the EPA's heightened concerns surrounding reclassified sources, the EPA proposes that additional oversight is appropriate to increase the effectiveness of controls for reclassified sources. PTE limits for reclassified sources are integral to ensure these sources are properly classified and are subject to the appropriate federal CAA

section 112 requirements. While the EPA intends to address PTE limits more generally in a separate rulemaking as discussed further below, this proposed rulemaking is specific to NESHAP sources that have reclassified from major to area sources, or will do so in the future.

In addition to EPA enforcement, citizen enforcement is another important component of federal enforceability that EPA proposes will enhance enforcement for reclassified source limits. There is considerable variability for citizens to participate in the state and local enforcement of permit terms and other measures to limit emissions across state and local jurisdictions. Whereas Congress granted considerable enforcement authority to citizens under the CAA and other environmental statutes, the ability of citizens to participate in state- and local-only enforcement proceedings is, generally speaking, very limited. The EPA's current understanding is that around one third of states allow for general environmental citizen suits, which are in addition to various media-specific state citizen suit statutes, which provide varying degrees of effectiveness for enforcing permit limits for reclassified sources at issue in this proposal.[23] Accordingly, in many instances, state and local permitting authorities are the only means of enforcement. To help ensure that reclassifying sources do not erode the goals of the CAA section 112 program, the EPA proposes the ability for citizens to enforce permits for such sources is needed. The EPA is seeking comment on the prevalence and effectiveness of citizen suit provisions in state and local enforceable HAP PTE limiting programs. Further, because of limitations on the EPA's and state and local enforcement authorities' budgets and resources and variability in priorities between state and local regulators and the EPA, the ability for citizen enforcement of limits for reclassified sources adds an important component of an effective enforcement regime.

The potential for federal enforcement for reclassified source limits provides an additional incentive for facilities to comply, ensures consistency in protection across jurisdictions, and

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[23] *See* P. Flynn & M. Barsa, *State Citizen Suits, Standing, and the Underutilization of State Environmental Law*, 52 Envtl. L. Rep. 10473 (June 2022) (noting that 17 states have general, non-media specific citizen suit statutes, in addition to dozens of media specific state citizen suit laws).

thereby enhances the effectiveness of controls. This is evidenced in the broad oversight authority to enforce the CAA that Congress granted to the EPA. Courts have recognized the EPA's ability to act to enforce the CAA even when a state has already acted.[24] The greater number of agencies or persons that can enforce the requirements, the greater the likelihood is that some action will be brought.[25] Indeed, federal enforceability enables the EPA to ensure that sources are abiding by the conditions they have adopted to opt out of federal major source standards; and grants citizens the ability to use the tools Congress provided in the CAA for same goal. Federal enforcement for reclassified sources creates a clear regulatory structure for EPA and citizen enforcement through the CAA and produces a level playing field on which sources are subject to the same enforcement mechanisms regardless of the state in which they are located.

In contrast, state-only enforceability for reclassified source limits creates significant burdens on the EPA if it were to attempt to enforce a violation of such a limit. In such instances, the EPA would either have to (1) litigate any enforcement issues of PTE limits taken to reclassify to an area source as a general citizen in the state forum (which is only available in states with citizen suit provisions that the EPA could utilize) or (2) only bring cases for violations of major source requirements (as opposed to permit limit exceedances that do not cross the major source threshold). State-only enforcement eliminates the EPA's use of the administrative enforcement powers granted by Congress that have been an effective and resource-saving means to bring

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[24] *See e.g.*, *Murphy Oil v. EPA*, 143 F.Supp.2d 1054 (W.D. Wis. 2001) (holding in part, the EPA was entitled to pursue an enforcement action under the CAA against a facility despite a prior settlement with the state for a related violation); *United States v. SCM Corp*., 615 F. Supp. 411 (D. Md. 1985) (holding the EPA could pursue enforcement against a facility for CAA violations after the same facility reached a settlement with the state regulator for related violations, explaining "[i]n a federal system, each person and entity is subject to simultaneous regulation by state and national authority"); *see also Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 167 (6th Cir. 1973) ("it is important to note [delegation to the state] does not detract from the Administrator's primary ability to enforce federally the provisions of every state plan against citizens of that state which drew the plan."); *cf. U.S. v. Power Engineering Co.*, 3030 F.3d 1232 (10th Cir. 2002) (deferring to the EPA's reasonable interpretation that the Resource Recovery and Conservation Act (RCRA) allows for the EPA to pursue an enforcement action despite the existence of a separate state enforcement proceeding).

[25] Increased enforcement leading to improvements in compliance is supported by the scientific literature. Gray and Shimshack (2011) survey the literature and find that rigorous monitoring and enforcement is a primary motivator for compliance with environmental regulatory requirements. The authors find that enforcement activities can lead to less violations and reductions in emissions. Gray, W. B., & Shimshack, J. P. (2011). The effectiveness of environmental monitoring and enforcement: A review of the empirical evidence. *Review of Environmental Economics and Policy.*

sources into compliance without mounting a full effort enforcing a violation of the major source requirements. Enforcing the requirements of a major source MACT in the face of a facially valid state-only enforceable permit or permit limit that grants the same source area source status by saying a source cannot exceed 9.9 tpy of any HAP (which the EPA does not consider enforceable as a practical matter as a blanket emission limit alone) could create conflicts between what limits a state interprets as sufficient to avoid major source MACT requirements and what limits the EPA interprets as enforceable as a practical matter (*e.g.*, a limit of 9.9 tpy on total HAP by itself is not enforceable as a practical matter). In such an instance a federal court may not be willing to entertain the conflict between the state and EPA in the permit challenge and *e.g*., dismiss the claim on the grounds of abstention, or remove the permit challenge to state court which may defeat the goal of national consistency of this federal program envisioned by Congress through federal court oversight. Furthermore, challenges to a facially-valid, state-only enforceable permit or permit term could create fairness issues (*e.g.*, reliance on a state's permitting decision) that a source could use in its defense that may prevent the EPA or citizens from even pursuing the enforcement.[26] Federal enforceability will help ensure that the safeguard provisions being proposed in this action are enforced for sources that reclassify.

The public notice and comment requirements included in 40 CFR part 63, subpart E provide an additional layer of transparency and accountability in creating HAP PTE limiting mechanisms used to measure compliance after reclassification to ensure they will contain sufficient information to assure compliance. The subpart E process does include requirements for public notice and comment when programs are submitted to the EPA for review and approval. The EPA is seeking comment on the need, associated burdens, and time required for public

[26] For example, courts may exercise the "*Burford* doctrine" under which a federal court may decline to interfere with state proceedings: "(1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) (internal citations omitted).

notice and comment beyond the process already present in 40 CFR part 63, subpart E. Specifically, we are seeking comments on whether the EPA should require, as an additional condition of reclassification, that every permit containing the provisions required in this proposal used to reclassify from a major source of HAP to an area source of HAP should undergo an individual public notice and comment period. Additionally, we are seeking comment on the public's understanding of the public notice and comment process involved in 40 CFR part 63, subpart E.

For these reasons, we are proposing that limits taken by sources to reclassify from major source to area source must be federally enforceable as defined in 40 CFR 63.2. We are seeking comment on additional benefits or drawbacks of federal enforceability for NESHAP reclassifications.

C. Ministerial Revisions from the 2020 MM2A Final Rule

In the 2020 MM2A final rule, the EPA introduced an interim ministerial revision to the definition of "potential to emit" in 40 CFR 63.2 to remove the word "federally" from the phrase "federally enforceable." As the EPA noted at the time, the revisions did not represent a final decision by the EPA or signal any direction that the EPA is intending to take in a future final action. The EPA is not revisiting this interim revision at this time. As noted in the previous section, the EPA's proposal to introduce federal enforceability for reclassified sources is being proposed as a separate provision from the 40 CFR 63.2 "potential to emit" definition, such that it would only apply to reclassified sources.

In this proposal, the EPA is solely focused on ensuring the sufficiency of permit limits for sources that reclassify from major to area sources. Accordingly, the EPA is not revisiting the interim ministerial revision to the definition of "potential to emit" in 40 CFR part 63 and will address the definition of PTE under 40 CFR part 63 in a separate rulemaking or guidance. Nor is the EPA addressing federal enforceability of PTE limits taken by other NESHAP sources (*i.e.*, sources that are not reclassified sources), nor sources in other programs such as NSR or title V,

for which the EPA previously introduced federally enforceable limits, but which may currently be subject to legally and practically enforceable state-law PTE limits. *See NMA v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) (remanding but not vacating federal enforceability of PTE limits for NESHAP sources); *CMA v. EPA*, 70 F.3d 637 (D.C. Cir. 1995) (remanding and vacating federal enforceability of PTE limits for NSR sources); *Clean Air Implementation Project v. EPA*, 1996 WL 393118 (D.C. Cir. June 28, 1996) (remanding and vacating federal enforceability of PTE limits for title V sources). The EPA plans to address the definition of PTE in the NESHAP, NSR, title V, and related programs in separate rulemaking or guidance. In the interim, before the EPA completes the future rulemaking or guidance on the definition of PTE across affected programs, the EPA's longstanding interpretation of the court decisions cited previously, and associated policy, remains in effect. Specifically, pursuant to the EPA's guidance the terms "federally enforceable" or "enforceable" as used in general definitions of "potential to emit" and related terms should be read to mean "federally enforceable or legally and practicably enforceable by a state or local air pollution control agency."[27] Note, this interpretation does not apply to the term "federally enforceable" as it is being introduced in this proposal as a condition for NESHAP sources to reclassify from major to area source status. Furthermore, to be eligible for consideration in determining PTE, any limitations, whether federally enforceable or not, must be enforceable as a practical matter, meaning both legally and practicably enforceable. To be practicably enforceable, limitations or standards used to constrain PTE must: 1) be technically accurate and specify the portions of the source subject to the limitation or standard; 2) specify the time period for the limitation or standard (*e.g.*, hourly, daily, monthly and/or annual limits such

[27] John Seitz and Robert Van Heuvelen, "Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit" (January 22, 1996).

as rolling annual limits); and 3) include a method for determining compliance, including appropriate monitoring, recordkeeping, and reporting.[28]

The EPA acknowledges that terminology referring to enforceability principles in EPA rules and guidance — such as the Agency's use of the terms "federally enforceable," "enforceable as a practical matter," and "legally and practicably enforceable" — has varied somewhat historically. The EPA specifically solicits comment on terminology used both in this notice and historically and welcomes suggestions for maximizing clarity for regulated entities and the public.

D. What Sources Will Have to Ensure All New Requirements Are Met and When Will Those Sources Need to Comply with the New Requirements?

The proposed requirements, once finalized, will apply to any sources that reclassify from major source status to area source status under the NESHAP program, including those that have already reclassified since issuance of the January 25, 2018, Wehrum Memorandum. For sources that have reclassified from major source status to area source status since *January 25, 2018,* under the NESHAP program *and* prior to the effective date of the final rule, the changes to 40 CFR part 63 proposed in this action will be effective within 3 years of publication of the final rule. Specifically, sources who reclassified from major source status to area source status since January 25, 2018 must have federally enforceable permit conditions including the safeguards proposed in this action within three years of publication of the final rule in order to maintain area source status. We are specifically seeking comment on whether to apply the proposed requirements to sources that have reclassified since the January 2018 Wehrum memo or whether

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[28] *See, e.g.*, John Seitz and Robert Van Heuvelen, "Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit" (January 22, 1996); John S. Seitz, "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act" (January 25, 1995); Kathie Stein, "Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and § 112 Rules and General Permits" (January 25, 1995); and Terrell E. Hunt and John S. Seitz, "Limiting Potential to Emit in New Source Permitting" (June 13, 1989); "In the Matter of Salt River Project Agricultural Improvement and Power District Aqua Fria Generating Station," Order on Petition No. IX-2022-4 (July 28, 2022); "In the matter of: Yuhuang Chemical Inc. Methanol Plant," Order on Petition No. VI-2015-03 (Aug. 31, 2016). *See* also 40 CFR 49.167, definition of "Enforceable as a Practical Matter."

this action should only apply to sources that reclassify after the effective date of the final rule. We request comments on the impacts of coming into compliance with the proposed requirements for sources that have reclassified since the January 2018 Wehrum memo. For those sources that reclassify after the effective date of the final rule, the proposed requirements will be effective upon reclassification. The process by which state air pollution control agencies can submit HAP PTE limiting mechanisms, such as rule adjustments, rule substitutions, equivalency by permit, or other mechanisms is described in 40 CFR part 63, subpart E for EPA review and approval. Programs that are approved pursuant to subpart E are federally enforceable and subpart E describes the necessary criteria for state programs that contain adjustments to CAA section 112 rules, state programs that substitute for CAA section 112 rules, and permit terms and conditions that substitute for CAA section 112 rules. We are seeking comment on the experience state agencies have had getting federally enforceable HAP PTE limiting mechanisms approved under subpart E and any potential hurdles that have prevented or would prevent state air pollution control agencies from submitting mechanisms for approval under 40 CFR part 63, subpart E. We are also seeking comment on the cost incurred by state air pollution control agencies to obtain subpart E approved programs. Given the timelines for EPA review and approval of state programs seeking approval for federally enforceable HAP PTE limiting mechanisms in subpart E, the EPA proposes that three years from publication of the final rule is sufficient time for sources who have chosen to reclassify to obtain federally enforceable HAP PTE limiting permit conditions. The EPA is seeking comment on the time needed for sources that have already reclassified to add such provisions as enforceable permit conditions, to the extent that they do not already exist.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders*.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is a "significant regulatory action" as defined in Executive Order 12866, as amended by Executive Order 14094. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket.

The EPA has not prepared a quantitative analysis of the potential costs and benefits associated with this action because it is highly uncertain which facilities may reclassify in the future as a result of the proposed rule, and any potential emissions changes that result from the added reclassification requirements will also be highly uncertain.[29] Furthermore, the EPA does not expect substantial costs for sources that have already reclassified and have not observed emission changes following a reclassification for this subset of facilities. Based on data available to the agency at this time, sources that have reclassified are unlikely to remove control devices to reduce HAP or take other actions that would increase HAP emissions. However, under the current framework, sources that reclassify in the future could operate in a manner that would increase emissions. This would be inconsistent with the aim of CAA section 112 to achieve lasting emissions reductions across a wide range of industries to protect public health and the environment.

Prior to 2018, the OIAI policy prevented major sources of HAP from reclassifying to area sources of HAP after the first substantive compliance date of a major source NESHAP. The OIAI policy was initially replaced by a January 25, 2018, guidance document, then was formally

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[29] In the Regulatory Impact Analysis for the 2020 MM2A Final Rule, the EPA assumed in the primary scenario that all facilities under 75% of the major source HAP emissions threshold that could potentially reclassify would over a 5-year time period from promulgation (2,700 facilities). While we are still within that time frame, the EPA has not seen nearly that many reclassifications occuring since the rule was promulgated. At the time of this proposal, around 200 facilities have reclassified. This represents over 90% fewer reclassifications than our estimate in the 2020 final rule. A list of facilities that have reclassified from major source to area source status at the time of proposal is available in the docket for this action. Therefore, we find the uncertainty in attempting to predict facility reclassification behavior to be too great to warrant an illustrative quantitative assessment of the proposed rule.

codified by the 2020 MM2A final rule wherein EPA advocated for a reading of the CAA that suggests that there should be no temporal restrictions on reclassifications.

The 2018 guidance memo and 2020 MM2A final rule allow facilities to reclassify from major sources of HAP to area sources of HAP at any time. Since 2018, about 200 facilities have reclassified, far short of the roughly 2,700 facilities we estimated might reclassify at the time of the 2020 final rule. Due to limited data available to the agency at the time of this proposal, the EPA does not have information regarding whether or how much emissions may have increased at any individual reclassified facilities – though we seek comment on that in this proposal. However, the current framework allows for emissions increases and decreased compliance assurance as all sources are required to do is obtain a PTE limit below the major source thresholds. We are requesting comment on specific examples of facilities that have had changes in actual emissions since reclassifying. The EPA has not heard about specific additional facilities' plans to reclassify that have not yet done so, but we seek comment on facilities that have considered reclassification but not yet done so and their reasons for waiting. However, it is reasonable to assume that additional reclassifications will occur over time. In the first half of 2023, there have been between zero and two reclassifications per month. We have added the list of reclassifications that have occurred to date at the time of this proposal to the docket for this action.

Currently, sources that reclassify are only required to remain below the major source threshold unless they become subject to an area source NESHAP, which they would have to comply with if it requires more stringent controls than would be needed to keep emissions below the major source threshold. That could lead to increased HAP emissions from sources whose emissions were well below the major source threshold due a major source NESHAP prior to reclassification in the absence of this rule. The EPA seeks to ensure that a reclassified source does not increase emissions because we find that scenario runs counter to CAA section 112's

goal of achieving lasting reductions of HAP emissions from major sources, as described earlier in this preamble.

We do not expect significant costs and whether any costs or savings are incurred due to reclassification is very case-specific. We do not possess sufficient information to quantify costs or cost savings for individual facilities but seek comment on costs or cost savings. The costs incurred for a given facility are better attributed to the individual NESHAP rules the facility was subject to prior to reclassification rather than the General Provisions of part 63. Any potential costs for facilities in the future that may choose to reclassify are expected to be negligible for sources that have not yet reclassified and we do not expect sources to reclassify if it will increase their costs.

The final MM2A rule already required electronic notification to the EPA and we are not requiring those sources who have already submitted notifications to resubmit their notification. We are seeking comments from sources who have already reclassified and information about changes in air pollution control devices at these facilities such that costs would be incurred to maintain emissions at a level that was achieved when the source was previously subject to a major source NESHAP.

We expect that sources that reclassify will experience cost savings that will outweigh any additional cost of achieving area source status. The only potential costs that would be incurred by sources and regulatory authorities would be the costs of preparing and reviewing a source's application for area source status and issuing enforceable PTE limits, respectively, as appropriate[30]. In addition, any potential costs associated with the reclassification of major sources as area sources (*i.e.*, application reviews and PTE issuance) may be offset by reduced reporting and recordkeeping obligations for sources that no longer must meet major source NESHAP requirements, depending on case-specific circumstances. Whether any cost or cost

[30] Illustrative example costs for a regulatory authority reviewing a source's application for area source status was estimated in the 2020 MM2A final rule, which is available in the docket for this action.

savings is incurred by any source choosing to reclassify is highly case specific and we are not providing quantitative estimates of costs in this proposal, however, we have included technical memoranda (*e.g.*, MM2A Cost Memorandum) for the 2020 final MM2A rule and the regulatory impact analysis (RIA) from that rulemaking in the docket for this action to provide illustrative examples of the types of costs and costs savings that may occur due to reclassifications. We are seeking comments on the potential costs or cost savings associated with this proposal and our assumption that any changes to the costs associated with reclassification will be negligible.

While the EPA does not expect this action to directly impact the level of control of any particular NESHAP standards, this proposal is expected to enhance transparency, promote national consistency in EPA and citizen enforcement, and improve compliance assurance through clearer criteria for NESHAP reclassifications. The processes by which state programs and permits are approved under 40 CFR subpart E, includes requirements for public notice and comment as well as creating programs and permits that are federally enforceable by the EPA and citizens. These additional layers of oversight increase the likelihood that sources will continue to effectively operate HAP pollution control equipment and create a framework for the EPA and citizens to pursue enforcement actions if they do not. Additionally, the EPA finds that the safeguards proposed in this action will ensure that HAP emissions reductions are achieved, and the corresponding public health and environmental benefits from decreased HAP emissions, are maintained at sources that reclassify from major sources of HAP to area sources of HAP.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. The proposed amendments to the General Provisions relate to voluntary actions taken by a source after consideration of the net impacts of the action. Therefore, this action would not impose any new information collection burden. The General Provisions do not themselves require any reporting and recordkeeping activities, and no ICR was submitted in connection with their original promulgation or their subsequent amendment. Any recordkeeping and reporting

requirements are imposed only through the incorporation of specific elements of the General Provisions in the individual NESHAP, which are promulgated for particular source categories that have their own ICRs. The PRA costs for sources that reclassify will be properly accounted for in the ICRs for the NESHAPs they were subject to.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the EPA concludes that the impact of concern for this rule is any significant adverse economic impact on small entities and that the agency is certifying that this rule will not have a significant economic impact on a substantial number of small entities because the rule relieves regulatory burden or has no net burden on the small entities subject to the rule.

Small entities that are subject to major source NESHAP requirements would not be required to take any action under this proposed rule; any action a source takes to reclassify as an area source would be voluntary. We expect that sources that reclassify will experience cost savings that will outweigh any additional cost of achieving area source status. We do not expect substantial costs for sources that have already reclassified. Sources that reclassify are unlikely to remove control devices to reduce HAP or take other actions that would increase HAP emissions, however, the possibility does exist under the current framework. The final MM2A rule already required electronic notification to the EPA and we are not requiring those sources who have already submitted notifications to resubmit their notification. We are seeking comments on whether sources who have already reclassified have indeed removed control devices such that costs would be incurred to maintain emissions at a level that was achieved when the source was previously subject to a major source NESHAP. The only potential cost that would be incurred by regulatory authorities would be the cost of reviewing a sources' application for area source status and issuing enforceable PTE limits, as appropriate. No small government jurisdictions operate their own air pollution control permitting agencies, so none would be required to incur costs

under the proposed rule. In addition, any costs associated with the reclassification of major sources as area sources (*i.e.*, application reviews and PTE issuance) are expected to be offset by reduced reporting and recordkeeping obligations for sources that no longer must meet major source NESHAP requirements. Whether any cost or cost savings is incurred by any source, including those owned by a small parent company, choosing to reclassify is highly case specific and we are not providing quantitative estimates of costs in this proposal, however, we have included technical memoranda from the 2020 final MM2A rule and the regulatory impact analysis (RIA) from that rulemaking in the docket for this action to provide illustrative examples of the types of costs and cost savings that can occur due to reclassifications. We are seeking comments on the potential costs or cost savings associated with this proposal and our assumption that the any changes to the costs associated with reclassification will be negligible.

Based on the considerations above, we have, therefore, concluded that this action will relieve regulatory burden on net for any regulated small entities that choose to reclassify to area source status.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. There are

two tribes that currently implement title V permit programs and one that implements an approved TIP for minor source permitting, the latter of which also has a major source. As a result, these tribes may have additional permit actions if sources in their jurisdiction seek reclassification to area source status. Any tribal government that owns or operates a source subject to major source NESHAP requirements would not be required to take action under this final rule; the reclassification provisions in the final rule would be strictly voluntary. In addition, achieving area source status would result in reduced burden on any source that no longer must meet major source NESHAP requirements. Under the proposed rule, a tribal government with an air pollution control agency to which we have delegated CAA section 112 authority would be required to review permit applications and to modify permits as necessary. However, any burden associated with the review and modification of permits will be offset by reduced Agency oversight obligations for sources no longer required to meet major source requirements.

For sources located within Indian country, where the EPA is the reviewing authority, unless the EPA has approved a non-federal minor source permitting program or a delegation of the Federal Indian Country Minor NSR Rule, the Federal Indian Country Minor NSR Rule at 40 CFR 49.151 through 49.165 provides a mechanism for an otherwise major source to voluntarily accept restrictions on its PTE to become a synthetic source, among other provisions. The Federal Indian Country Minor NSR Rule applies to sources located within the exterior boundaries of an Indian reservation or other lands as specified in 40 CFR part 49, collectively referred to as "Indian country." See 40 CFR 49.151(c) and 49.152(d). This mechanism may also be used by an otherwise major source of HAP to voluntarily accept restrictions on its PTE to become a synthetic area HAP source. The EPA's Federal Implementation Plan (FIP) program, which includes the Federal Indian Country Minor NSR Rule, provides additional options for particular situations, such as general permits for specific source categories, to facilitate minor source emissions management in Indian country. Existing sources in Indian country may have PTE

limits that preceded the EPA's FIP for minor sources and, for that reason, were issued in a 40 CFR part 71 permit or FIP permitting provision applicable to Indian country.

Consistent with EPA policy, the EPA will offer to consult with the potentially impacted tribes and other tribes upon their request.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not directly regulate any emission source and will not have any direct impact on children's health. The emissions reductions achieved by individual NESHAP are properly accounted for in those individual NESHAP rather than the General Provisions. This action will not change the level of emissions reductions achieved by those NESHAP. While we do not expect this action to have any direct impact on children's health, preventing emissions increases will ensure protections achieved via any NESHAP that a source was subject to at the time of reclassification will provide continued protection achieved by any NESHAP that source was formerly subject to.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. We have concluded that this action is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing our Nation's Commitment to Environmental Justice for All

The EPA believes that this action does not have disproportionate and adverse human health or environmental effects on communities with environmental justice concerns because it does not establish an environmental health or safety standard. The proposed amendments to the General Provisions are procedural changes and do not impact the technology performance nor level of control of the NESHAP governed by the General Provisions.

While the EPA does not expect this action to directly impact the level of control of any particular NESHAP standards, this proposal is expected to enhance transparency, promote national consistency in EPA and citizen enforcement, and improve compliance assurance through clearer criteria for NESHAP reclassifications. The processes by which state programs and permits are approved under 40 CFR subpart E, includes requirements for public notice and comment as well as creating programs and permits that are federally enforceable by the EPA and citizens. These additional layers of oversight increase the likelihood that sources will continue to effectively operate air pollution control equipment and create a framework for the EPA and citizens to pursue enforcement actions if they do not. Additionally, the EPA finds that the safeguards proposed in this action will ensure that HAP emissions reductions are achieved, and the corresponding public health and environmental benefits from decreased HAP emissions, are maintained at sources that reclassify from major sources of HAP to area sources of HAP.

List of Subjects in 40 CFR Part 63

Environmental protection, Area sources, General provisions, Hazardous air pollutants, Major sources, Potential to emit.

Michael S. Regan,

Administrator.

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